STATE OF MICHIGAN

COURT OF APPEALS

TERRY WILLIAMSON and DOROTHY WILLIAMSON, Plaintiffs-Appellants, v FORD MOTOR COMPANY, Defendant-Appellee.	UNPUBLISHED February 10, 2005 No. 250218 Wayne Circuit Court LC No. 02-221261-NO

Before: Schuette, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissing the case with prejudice. We affirm.

I. FACTS

This case revolves around a shipping shack, a small office, located inside defendant's Sheldon Road plant in Plymouth Township. The shipping shack is elevated approximately eleven inches above the concrete plant floor. A single metal step with a grated surface leads up to the door of the shipping shack, which is the primary entrance to the shipping shack. The surface of the step is gray and the legs of the metal step are painted yellow, which distinguishes the color and texture of the metal step from the concrete floor. The metal step is elevated approximately six inches above the concrete floor, and the threshold of the shipping shack is elevated approximately five inches above the metal step. The metal step and threshold together effectively create two steps.

In September or October of 1999, defendant, Terry Williamson "Terry", a truck driver for J.B. Hunt, drove to defendant's Sheldon Road plant in Plymouth Township to pick up a load of automotive parts. Terry used the aforementioned steps and entered the shipping shack to obtain a bill of lading. After signing the bill of lading, Terry left, stepping down out of the shipping shack without incident.

On November 5, 1999, Terry returned to defendant's Sheldon Road plant to pick up another load of automotive parts. At approximately 5:00 a.m., Terry entered the shipping shack to obtain a bill of lading. Again, Terry climbed the same steps and entered the shipping shack without incident. After Terry obtained the bill of lading, he backed away from the front desk and

turned to leave. When Terry began to turn, his foot, already halfway out of the door, caught the edge of the threshold, causing Terry to fall out of the door. Terry fell down the steps to the concrete floor, landing on his right side. Initially, Terry thought he had sustained only a sprained ankle, but later learned he had sustained a serious permanent back injury, which required surgery.

II. OPEN & OBVIOUS DEFENSE

On appeal, plaintiffs first argue that the trial court erred by not acknowledging that "special aspects" existed where defendant knowingly conducted business with Terry Williamson[1] when Terry's back was to the steps and his attention was drawn away from the nature and proximity of the hazard. We disagree.

A. Standard of Review

A trial court's determination of a motion for summary disposition is reviewed de novo. *Taxpayers of Michigan Against Casinos v State of Michigan*, 471 Mich 306, 317; 685 NW2d 221 (2004). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for the claim. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 42; 672 NW2d 884 (2003). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In determining whether a genuine issue of material fact exists, this Court considers the pleadings, admissions, affidavits and the other documentary evidence in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is not favored in negligence actions because the determination of whether a defendant breached a duty of care is ordinarily a question of fact for the jury. *Latham v National Car Rental Systems, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000). However, summary judgment is appropriate if a plaintiff fails to establish a prima facie case of negligence. *Id.*

B. Analysis

To establish a prima facie case of negligence, a plaintiff must prove: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Fultz v Union-Commerce Associates*, 470 Mich 460, 463; 683 NW2d 587 (2004). The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff. *Id.* The defendant's duty to a visitor depends on the visitor's status as a trespasser, licensee or invitee. *James v Alberts*, 464 Mich 12, 19; 626 NW2d 158 (2001), citing *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). An "invitee" is a person who "enters the land of another for a commercial purpose on an invitation that carries with it an implication that reasonable care has been used to prepare the premises and to make them safe." *O'Donnell v*

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[1] Plaintiff, Terry Williamson, will be referred to as "Terry."

Garasic, 259 Mich App 569, 573; 676 NW2d 213 (2003). Terry was an invitee because he was on defendant's property for a commercial purpose: to pick up a load of automotive parts.

An invitor owes a duty to exercise reasonable care to protect its invitees from an unreasonable risk of harm caused by a dangerous condition on the land. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328; 683 NW2d 573 (2004). However, generally, this duty does not extend to open and obvious dangers. *Id.*, citing *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). A condition is open and obvious if it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection. *O'Donnell*, *supra* at 575, citing *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997). The determination of whether a condition is open and obvious depends on the objective condition of the premises. *Mann*, *supra* at 329.

Although open and obvious, a danger may impose liability on an invitor if it has special aspects creating an unreasonable risk of harm. *O'Donnell*, *supra* at 574. "A special aspect exists when the danger, although open and obvious, is unavoidable or imposes a 'uniquely high likelihood of harm or severity of harm.'" *Bragan v Symanzik*, 263 Mich App 324, 331-332 ; 687 NW2d 881 (2004), quoting *Lugo*, *supra* at 518-519.

We hold that no genuine issue of material fact existed regarding whether the fact that defendant conducted business with Terry when Terry's back was to the hazard and his attention was drawn away from the hazard constituted a special aspect that would render the open and obvious risk of the steps unreasonably dangerous. The steps were open and obvious and had no such special aspects.

Steps generally constitute open and obvious dangers. *Lugo*, *supra* at 517.

> "With the axiom being that the duty is to protect invitees from *unreasonable* risks of harm, the underlying principle is that even though invitors have a duty to exercise reasonable care in protecting their invitees, they are not absolute insurers of the safety of their invitees. Consequently, because the danger of tripping and falling on a step is generally open and obvious, the failure to warn theory cannot establish liability." [*Id.*, quoting *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995) (internal citations omitted).]

> "Because steps are the type of everyday occurrence that people encounter, under most circumstances, a reasonably prudent person will look where he is going, will observe the steps, and will take appropriate care for his own safety. Under ordinary circumstances, the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary steps 'foolproof.' Therefore, the risk of harm is not unreasonable." [*Lugo, supra*, quoting *Bertrand, supra* at 616-617.]

Given the objective condition of the premises, the steps constituted an open and obvious danger. The shipping shack is a small office elevated approximately eleven inches above the concrete floor of defendant's Sheldon Road plant. The metal step to the shipping shack is elevated six inches above the ground. The threshold of the shipping shack is elevated five inches above the step. The step and the threshold together effectively create two steps. The surface of

the step is gray and the legs of the step are painted yellow. A yellow line marks the floor in front of the step. Terry testified that there are differences in color and texture between the metal step and the concrete floor of defendant's plant. Terry also testified that there was an obvious difference between the texture of the step and the texture of the wood and tile floor inside the shipping shack.

Given the objective condition of the steps, it is reasonable to expect that an average person of ordinary intelligence would discover the steps upon casual inspection. *O'Donnell, supra* at 575. In fact, Terry did discover the steps on both his prior visit to defendant's plant and on the day in question. During his prior visit to defendant's facility, Terry walked up the steps and entered the shipping shack. After obtaining a bill of lading, Terry left, stepping down out of the shipping shack without incident. Also, as Terry climbed the two steps to enter the shipping shack, he was aware of the step on day of his fall. Terry testified that there was nothing obstructing his view of the step. Thus, a reasonable person in Terry's position would both observe the step and foresee the potential danger. *Corey, supra* at 5. Viewing the evidence in the light most favorable to plaintiffs, there was no genuine issue of material fact regarding whether the steps were open and obvious.

Also, the steps had no special aspects. The fact that defendant conducted business with Terry when Terry's back was to the hazard does not constitute a special aspect that would render the open and obvious risk of the steps unreasonably dangerous. The open and obvious danger did not impose a uniquely high likelihood of harm or severity of harm and was not unavoidable.

The open and obvious danger was not unreasonably dangerous. The distance from the threshold of the shipping shack to the plant floor was approximately eleven inches. Given the short distance, there is not a "'uniquely high likelihood of harm or severity of harm.'" *O'Donnell, supra* at 574, quoting *Lugo, supra* at 519.

> Although the steps likely had "some potential for severe harm," we have no doubt that these circumstances are not the type of specials aspects that *Lugo* contemplated. In this case, the stairway on which plaintiff fell consisted of three steps and was elevated only a couple of feet. Falling several feet to the ground is not the same as falling an extended distance such as into a thirty-foot-deep pit. . . . "Unlike falling an extended distance, it cannot be expected that a typical person [falling a distance of several feet] would suffer severe injury" or a substantial risk of death. [*Corey, supra* at 7, quoting *Lugo, supra* at 518, 520.]

Viewing the evidence in the light most favorable to plaintiffs, the front desk was located near the shipping shack door. Also, Terry testified that an unidentified employee of defendant informed him that three to four people fall each week. Nonetheless, there was no genuine issue of material fact regarding whether the open and obvious risk of the steps was unreasonably dangerous. The steps were not unreasonably dangerous, but rather, created a risk of harm only if persons did not act in a reasonably prudent manner and look where they were walking. *Lugo, supra* at 522, quoting *Bertrand, supra* at 616-617.

Terry testified that he did not look where he was going before he fell. On the day in question, Terry stepped into the shipping shack. The person at the back desk instructed Terry to go to the front desk, near the shipping shack door. Terry returned to the front of the shipping

shack and was handed a bill of lading. After Terry obtained the bill of lading, he "backed away from the desk, or whatever it was, and turned to go out and I fell out the door." Terry's deposition testimony established that, although he was aware of the presence of the door and the steps, when he backed away from the desk, he was not looking where he was going.

> *Q* So you were not looking in the direction you were turning?
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> *A.* Not unless I had eyes in the back of my head.
>
> *Q.* Why didn't you look before you turned?
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> *A.* Why should I? I mean, you can't turn your head all the way around and look at everything you are looking at. Have you ever turned without looking? . . . . It's normal. I turned and fell out the door.
>
> *Q.* But you did not look first before you turned?
>
> *A.* No. I was looking at – had my mind on the business and I turned and fell out the door.

If Terry had looked where he was going, he would have observed the steps and would have been able to take appropriate care for his own safety. *Lugo, supra*at 522, quoting *Bertrand, supra* at 616-617. Therefore, the fact that Terry's attention was drawn away from the hazard does not constitute a special aspect posing an unreasonable risk of harm.

Similarly, the fact that Terry's attention was drawn away from the hazard did not render the open and obvious danger unavoidable. Although Terry was required to exit the shipping shack by walking through the door and down the steps, the open and obvious danger posed by the steps was not unavoidable. Rather, if Terry had looked where he was going, he would have avoided any danger. Viewing the evidence in the light most favorable to plaintiffs, the circumstances cited by defendant "did not rise to level of unreasonably dangerous conditions contemplated in *Lugo* or prior cases." *Joyce v Rubin*, 249 Mich App 231, 241; 642 NW2d 360 (2002).

III. BUILDING CODE VIOLATIONS

Plaintiffs' second argument on appeal is that the trial court erred in holding that the building code violations did not constitute special aspects rendering the steps unreasonably dangerous. Again, we disagree. Building code violations are insufficient to impose a legal duty of care on an invitor. *Summers v City of Detroit*, 206 Mich App 46; 520 NW2d 356 (1994). Although a building code violation may be some evidence of negligence, it is insufficient to impose a legal duty cognizable in negligence. *Id.*

> Not all BOCA code violations will support a special-aspects factor analysis in avoidance of the open and obvious danger doctrine. The critical inquiry is whether there is something unusual about the [condition] because of the character, location, or surrounding conditions that gives rise to an unreasonable risk of harm. "If the proofs create a question of fact that the risk of harm was unreasonable, the

> existence of duty as well as breach become questions for the jury to decide." [*O'Donnell, supra* at 578-579, quoting *Bertrand, supra* at 617 (internal citations omitted).]

Building code violations do not create a duty with respect to open and obvious conditions that are not unreasonably dangerous. *Corey, supra* at 9 n 1. The existence of a building code violation does not go to the question of whether there are special aspects rendering the open and obvious risk of the steps unreasonably dangerous. *Zainea v City of Grosse Pointe Woods*, unpublished opinion per curiam of the Court of Appeals, issued December 17, 2002 (Docket No. 232513).[2] In order for the defendant to owe a duty to the plaintiff, the open and obvious condition must still present an unreasonable risk of harm. *Id.* We hold that the building code violations do not constitute special aspects rendering the open and obvious risk of the steps unreasonably dangerous. Because there was no unreasonable risk of harm, the building code violations do not support a special aspects analysis. Although defendant's expert disputed one of the code violations, viewing the evidence in the light most favorable to plaintiffs, several building code violations existed. First, plaintiffs' expert testified that the steps lacked dimensional uniformity; whereas the step was elevated six inches from the concrete floor, the threshold of the shipping shack was elevated five inches above the step. Second, the step did not have a contrasting marking stripe. Third, the threshold of the door should have been beveled. Fourth, the door did not have a landing. Fifth, the steps did not have a handrail.

Viewing the evidence of the building code violations in the light most favorable to plaintiffs, the violations were insufficient to impose a legal duty on defendant. *Summers, supra* at 52. In this case, the open and obvious danger of the steps had no special aspects; it was not unavoidable and did not impose a uniquely high likelihood of harm or severity of harm. *Lugo, supra* at 518-519. Given that the condition was open and obvious and did not possess "special aspects" rendering it unreasonably dangerous, defendant owed no duty of care to Terry with respect to the steps. As the *Corey* Court stated, "with regard to the building code violation allegation in this case, we note that the absence of a handrail deals with proximate causation. Because a duty did not exist in this case because of the open and obvious condition and the lack of a special aspect, we need not reach this issue." *Corey, supra* at 9 n 1.

IV. DUTY

Finally, plaintiffs argue that the trial court erred in ruling that defendant had no duty to warn Terry of the steps. We disagree. The open and obvious doctrine applies both to claims that the defendant breached a duty in allowing the dangerous condition to exist and to claims that the defendant failed to warn the invitee. *Corey, supra* at 3; *Millikin v Walton Manor Mobile Home Park*, 234 Mich App 490, 495; 595 NW2d 152 (1999). As the steps were open and obvious and did not possess special aspects that were unavoidable or that would create a uniquely high likelihood of harm or severity of harm, defendant had no duty to warn Terry.

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[2] We recognize that an unpublished opinion is not precedentially binding. MCR 7.215(C)(1).

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Peter D. O'Connell